

Dien v Weiner

2012 NY Slip Op 33254(U)

November 15, 2012

Sup Ct, Nassau County

Docket Number: 004035/12

Judge: Randy Sue Marber

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

Justice

TRIAL/IAS PART 14

_____X

JANE C. DIEN and JEFFREY DIEN,

Plaintiffs,

Index No.: 004035/12

Motion Sequence...01

-against-

Motion Date...09/04/11

XXX

KAREN WEINER, R.D.H.,

Defendant.

_____X

- Papers Submitted:
- Notice of Motion.....X
- Affirmation in Opposition.....X
- Memorandum of Law in Opposition.....X
- Reply.....X

Upon the foregoing papers, the motion by the Defendant, Karen Weiner, R.D.H., pursuant to CPLR § 3211 (a) (5) seeking an order dismissing Plaintiffs' complaint is determined as provided herein.

The Plaintiff, Jane C. Dien, claims that she received dental treatment from the Defendant, a Registered Dental Hygienist, employed by Long Island Smile, during 1995 and continuing until August 2009. The summons and complaint in this matter, filed on or about March 29, 2012 alleges dental malpractice. Prior to the filing of the within summons and complaint, the Plaintiffs commenced a separate action entitled, *Jane C. Dien and Jeffrey*

Dien v. Neal Seltzer, Jeffrey S. Rein and Long Island Smile, (Index No.: 84666/2010), (the “companion action”) also pending in Supreme Court, Nassau County. The summons and complaint in the companion action was served upon those Defendants on May 11, 2010.

The Defendant in the within action alleges in her moving papers that the within summons and complaint must be dismissed because the Plaintiffs’ causes of action against her are barred by the statute of limitations pursuant to CPLR § 214-a. The Plaintiffs, in their opposition, contend that the within summons and complaint is not time barred because the instant matter relates back to the companion action pursuant to CPLR § 203 (f).

In considering a CPLR § 3211 motion to dismiss, the court “must give the complaint a liberal construction, accept the allegations as true and provide plaintiffs with the benefit of every favorable inference.” (*Roni LLC v. Arfa*, 18 N.Y.3d 846, 848 [2011]; *People ex rel. Cuomo v. Coventry First LLC*, 13 N.Y.3d 108, 113 [2009]; *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]).

Pursuant to CPLR § 214-a, a dental malpractice action “must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition gave rise to the said act, omission or failure;...”. Pursuant to the record before this Court, the parties appear to have acquiesced that the applicable statute of limitations with regard to the instant matter would have expired on December 30, 2011.

The New York Court of Appeals, in *Buran v. Coupal*, 87 N.Y.2d 178 (1995),

established a three prong test that must be satisfied in order for claims against one defendant to relate back to claims asserted against another. The three elements of the test are as follows:

- 1) both claims arose out of same conduct, transaction or occurrence;
- 2) the new party is 'united in interest' with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and
- 3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well.

“The burden is on the plaintiff to establish the applicability of the doctrine once a defendant has demonstrated that the statute of limitations has expired.” (*Spaulding v. Mt. Vernon Hosp.*, 283 A.D.2d 634 [2nd Dept. 2001]). Here, the Defendant has proven that the statute of limitations has expired with regard to the instant matter. Even accepting the allegations in the complaint as true, the treatment of the Plaintiff, Jane C. Dien, by the Defendant at the latest, terminated on or about August 2009. The instant matter was commenced on March 29, 2012, clearly beyond the two years and six months statute of limitation for dental malpractice pursuant to CPLR § 214-a.

Pursuant to the record before this Court both claims arose out of the same conduct, transaction or occurrence and therefore, the first element of the test has been

satisfied by the Plaintiff.

The second element of the test has also been satisfied by the Plaintiff as the Defendants named in the companion action are united in interest and can therefore be charged with such notice of the institution of the action and will not be prejudiced in maintaining a defense on the merits. “Parties are united in interest only where the interest in the subject matter of the action is such that their defenses will be the same and they will either stand or fall together with respect to the plaintiff’s claim.” (*Losner v. Cashline, L.P.*, 303 A.D.2d 647, 648 [2nd Dept. 2003]). Here, the Defendant treated the Plaintiff while employed at Long Island Smile by the Defendants in the companion action and she continues to be employed by Long Island Smile.

The Plaintiff has, however, failed to satisfy the third element of the test as set forth in “*Buran*” *id.* First, the Plaintiff must show that the Defendant knew or should have known, absent excusable mistake by the Plaintiff that the suit would have been brought against her as well. The Plaintiff did not meet that burden. The Defendant is simply an employee of Long Island Smile and worked for DDS Jeffrey Rein, DDS Martin Shear and DDS Neal Selzter (the Defendants in the companion matter). There is no allegation that she has ever been a partner with Drs. Rein, Shear and Seltzer. Nor has there been any allegation that the Defendant has been an owner or operator of Long Island Smile. Therefore, the Plaintiff failed to prove that the Defendant knew or should have known that the action would have been brought against her as well, as she is just an employee and has no proprietary

interest in Long Island Smile.

Further, the Plaintiff has failed to state an excusable mistake as to identifying the Defendant. In addition, the Plaintiffs do not claim in their motion papers that they sued the wrong dental hygienist at Long Island Smile. Although the Plaintiffs claim that they only learned that the Defendant treated the Plaintiff, Jane C. Dien, during a deposition of Dr. Rein, conducted March 6, 2012, the excerpt referenced by the Defendant of the Plaintiff's deposition conducted on July 14, 2011, in the companion matter, evidences that Ms. Dien was aware that a dental hygienist named Karen treated her during the alleged occurrence dates from which this matter stems. Yet, it remains unknown why the Plaintiffs failed to serve the Defendant immediately following Ms. Dien's deposition on July 14, 2011 in the companion matter. It is difficult to believe that the Plaintiff never advised or discussed, prior to, or even subsequent to her deposition in the companion matter that she was treated by a dental hygienist, or that some form of discovery did not occur in the companion matter whereby the Plaintiffs learned the names of any other individuals associated with Long Island Smile who treated the Plaintiff throughout her years as their patient. Consequently, the Plaintiffs failed to adequately explain why they did not include a claim against the Defendant in a timely manner, although they were aware that the Defendant was employed at Long Island Smile and in fact, treated the Plaintiff during her visits to Long Island Smile. The Plaintiffs' contention that they only recently learned of the Defendant's treatment of Ms. Dien is insufficient and unpersuasive.

Accordingly, it is hereby

ORDERED, that the Defendant's motion is **GRANTED** and the complaint is **DISMISSED**.

All matters not decided herein are hereby denied.

This constitutes the decision and order of this court.

DATED: Mineola, New York
November 15, 2012



Hon. Randy Sue Marber, J.S.C.
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ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE